



United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

Exhibit 1



IN REPLY REFER TO:

MEMORANDUM

To: Director, U.S. Fish and Wildlife Service

From: Assistant Solicitor, Fish Wildlife and Environmental Protection Branch

Subject: Guidance on Compiling an Administrative Record

The first, and sometimes most difficult, part of a lawsuit is assembling the administrative record – the collection of documents that reflects the Service's decision-making process. These are the documents that a judge will review to determine whether that process and the Service's final decision were proper. This memo explains what the administrative record is, summarizes major points to consider when assembling the record, and explains why an accurate and thorough record is crucial. Attached is guidance provided by the Department of Justice, which gives more detailed advice on how to compile an administrative record.

The requirement to provide an administrative record in the course of litigation comes from the Administrative Procedure Act, which states that judges must review agency actions based on the "whole record." As explained further in the attached guidance, this has been interpreted to mean all documents and materials directly or indirectly considered by persons involved in the decision-making process. Thus, the record should include:

- ★ All documents and materials that were before or available to persons involved in the decision at the time the decision was made.
- ★ All documents that were considered or relied upon by persons involved in the decision.
- ★ Documents that relate to both the substance and procedure of making the decision.
- ★ All pertinent documents regardless of whether they favor the decision that was finally made, favor alternatives other than the final decision, or express criticism of the final decision. Documents should never be withheld just because they reflect negatively on the decision that was finally made.
- ★ Documents that may end up later being redacted or removed from the record on the basis of privilege.

The record should not include:

- ★ Documents associated with, but not part of, the decision-making process, such as fax cover sheets.
- ★ Various versions of a document where the differences among the drafts reflect minor editing changes. Include drafts, however, where hand-written notes or changes from one version to the next reflect the evolving process.
- ★ E-mails and other correspondence that discuss the agency action generally but do not reflect decision-making considerations by staff (for example, communications between biologists whose work may be affected by the outcome of the decision-making process but who are not involved in the decision itself).

Providing a thorough and accurate record to the court allows the Service to show a judge that it fully considered all relevant factors during the decision-making process. While a judge may allow the Service to later supplement a record with documents that were overlooked during the initial compilation, we lose credibility when we have to add documents that should have been included from the beginning. At worst, an incomplete record may affect the Service's ability to defend its final decision by signaling to the court that the agency's decision was not based on a reasoned consideration of all important information.

The importance of a complete and accurate record underscores the need not to wait until a lawsuit is filed before collecting all documents before the Service during the decision-making process. Any and all documents that are considered should be collected and organized as the decision-making process evolves. In the new world of e-mail and the Internet, correspondence that reflects the decision-making process should be printed out and stored with memos, research papers, and other documents. Where options are weighed or decisions made during meetings and conference calls, a document such as a memo to the file will memorialize how the decision was reached and show that the agency fully considered all aspects of the situation before making the decision. Finally, the person assigned the responsibility of compiling and organizing the administrative record should remember to check with all other persons and offices – including the Washington office – that may have documents that should be included in the record.

Putting together a good administrative record is complicated, and questions will always arise over whether or not a particular document belongs in the record. We strongly recommend that managers and anyone who could be involved in assembling an administrative record read this memo and the attached guidance from the Department of Justice. That guidance was put together specifically because of the importance of building a good administrative record when defending agencies such as the Service. It is imperative that Service staff understand and follow this guidance. Any Service staff that have questions about administrative record requirements in general or any document in particular should contact the Solicitor's Office for assistance.

cc: Regional Solicitors